**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JESSICA L. DOWLER**<br>Claimant | ) | |
| VS. | ) | |
| **THE MANOR**<br>Respondent | ) | Docket No. 1,022,598 |
| AND | ) | |
| **KANSAS HEALTHCARE ASSOCIATION**<br>**WC INSURANCE TRUST**<br>Insurance Carrier | ) | |

## ORDER

Claimant requested review of the August 31, 2006, Award entered by Special Administrative Law Judge Marvin Appling. The Board heard oral argument on November 15, 2006.

### APPEARANCES

Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Kirby A. Vernon, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board the parties agreed to the finding by the Special Administrative Law Judge (SALJ) that claimant was hired as a full-time 40 hours per week employee and that her preinjury average weekly wage was $387.20.

### ISSUES

The SALJ found that claimant suffered a 5 percent permanent partial disability to the body as a whole. This was based upon her impairment of function. Although claimant was not earning 90 percent of her preinjury average weekly wage, the SALJ did not award

a work disability. There was no explanation in the Award for why work disability was denied. Claimant argues that she is entitled to a work disability because she was terminated by respondent and, despite making a good faith job search, she has been unable to find work for comparable pay. Claimant requests a 44.75 percent work disability based on a task loss of 51.5 percent and a wage loss of 38 percent.

Respondent argues that claimant is not entitled to a work disability and that the Board should find that claimant has no permanent impairment from her work-related injuries.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant worked as a certified nurse's aide (CNA) at respondent. She earned $8.75 per hour plus fringe benefits. Although she was regularly scheduled to work a 40-hour week, she sometimes worked less than 40 hours. But sometimes she worked more than 40 hours and was paid overtime. On November 20, 2004, claimant was injured when the lift in a whirlpool bath malfunctioned and she had to manually lift a patient. She felt back pain, neck pain, and hip pain and went to the emergency room. A few days later, she went to her personal physician, Dr. Ron Marek, for follow up. Dr. Marek allowed claimant to return to work but gave her a lifting limitation of 20 pounds. Claimant returned to Dr. Marek on December 9, 2004, with continued pain. She told him that respondent had not honored her lifting restriction and that she was working at full activity. Dr. Marek took her off work through December 14, at which time he released her to return to work with a restriction of light duty with no heavy lifting. Claimant continued to work until January 11, 2005, when she was again injured while lifting patients. When she saw Dr. Marek, he took her off work completely since respondent was continuing to require her to do heavy lifting outside her restrictions.

At the request of respondent, claimant saw Dr. Sandra Barrett on March 2, 2005. Claimant said that Dr. Barrett checked her reflexes and said her back was fine and that she could return to work with no restrictions. Claimant took Dr. Barrett's note to the Director of Nursing, Marsha Bunyan. Claimant said she asked Ms. Bunyon more than once about returning to work at respondent. She also talked to Izena Monk, administrator and CEO of respondent, and asked if she could return to work within her restrictions.

After a preliminary hearing, Dr. Bernard Poole was authorized as claimant's treating physician. He released claimant to return to work on July 20, 2005. However, his medical note of that date states: "[T]his patient is constitutionally unfitted for work involving heavy

bending and lifting . . . ."[1] That same day, claimant talked to Ms. Monk. Claimant asked if she could return to work within Dr. Poole's restrictions, and Ms. Monk told her respondent did not have any work she could do. Ms. Monk did not terminate claimant at that time but told her she should look for another job. Claimant said she was willing to return to work for respondent and stay within her restrictions. She testified she did not tell Ms. Monk that she was not willing to return to work for respondent. Claimant, however, testified that even if the hoists worked properly at respondent, she would not feel comfortable transferring residents because she was afraid she might drop them.

On August 10 or 11, 2005, claimant received a letter from Ms. Monk dated August 9, 2005, advising her that she was being terminated from respondent effective that date. After she received the letter, she went in to visit with Ms. Monk again. She asked Ms. Monk if she was really being fired, and Ms. Monk confirmed that she was.

Claimant introduced into evidence a list of businesses where she has sought jobs since being terminated by respondent in August 2005. She said she had started looking before she kept a list and went to five or six other businesses looking for work other than those on her list. She was offered one job as a result of her search, at a Conoco gas station in Ponca City, Oklahoma. She started the job at the gas station on February 20, 2006. She makes $7 an hour and works an average of 35 hours per week. She runs a cash register, and the most she has to lift is a seven pound bag of ice.

Claimant is a high school graduate and participated in cheerleading and the saddle club during high school. In taking care of horses, she would lift 50-pound feed sacks, 50- to 70-pound bales of hay, and 35- to 75-pound saddles. She never had a problem lifting a 50-pound bag of feed and would carry the bags 10 to 15 feet. She would carry bales of hay the same distance. She would lift saddles from the ground to about head level and saddled her horse every day for four years. She never suffered an injury to her back performing these activities.

Claimant also testified that she had jobs during and after high school that required her to lift heavy weights. She worked at a pizza restaurant and a Duckwalls, both of which required her to unload trucks. After high school, claimant worked for Creative Community Living (CCL) as a mental retardation aide. At CCL she was required to perform heavy lifting, pushing, pulling, or carrying. She never had any difficulty with her back as a result of any of her work duties before her injuries at respondent.

Claimant testified that since the November 2004 accident, her back hurts constantly, her hips hurt, her neck hurts, and her knees are starting to bother her. The pain seems to be traveling down her back.

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[1] Poole Depo., Ex. 1 at 1.

Claimant's step-father, Mike Weakley, testified that claimant has been riding horses most of her life. She could saddle her own horse and rode every day. She also took care of the horses they owned, including feeding and tending to them. She would haul 50-pound bags of grain and buck hay bales weighing 40 to 80 pounds. She would also help haul brush, which required her to pull 40-pound limbs and 50-pound logs. Claimant also used to carry a 100-pound dog up stairs. Mr. Weakley never noticed her having any problems with her back before her November 2004 accident at respondent.

Izena Monk is the administrator and CEO of respondent. She testified that claimant was a full-time employee. If claimant worked over 40 hours per week, she received overtime pay. Claimant's last day of work was January 11, 2005. Claimant was then off on medical leave. Her personnel file gave no reason for termination, and the form where a question was asked whether she was available for rehire is marked with a question mark.

Ms. Monk had a notation in her records concerning a conversation between claimant and the Director of Nursing wherein claimant said that the doctor had told her she had messed up her back, that she needed to find a new line of work, and that she needed to resign. There is no paperwork in claimant's personnel file that shows that claimant actually resigned.

Ms. Monk testified that after claimant was released from medical treatment, she came back to respondent and said that the doctor had released her but that she could not do the work because she was hurt. Ms. Monk admitted she did not have this documented. Ms. Monk said that it was decided that claimant should not work at respondent because, based on information from the claimant, there would be no work that claimant could do.

Ms. Monk stated that if claimant could lift up to 50 pounds, she could work at respondent as a nurses aide because it is a no-lift facility and has mechanical lifts for residents. However, Ms. Monk testified that claimant said that she could not do the work.

Respondent argues claimant is not entitled to a permanent partial disability award because her injuries were not permanent. However, should the Board determine that claimant did suffer permanent injuries, claimant should be denied an award of work disability "because she retains the capacity of working at her pre-injury wage and because she refused to return to work for respondent after she had been released to return to work with no restrictions."[2]

Dr. Sandra Barrett is board certified in physical medicine and rehabilitation. She saw claimant on March 2, 2005, and again on December 15, 2005, both times at the request of respondent. At the March 2005 evaluation, claimant's chief complaint was neck and back pain. After examination, Dr. Barrett found no significant findings and diagnosed

[2] Respondent's Brief at 2 (filed October 27, 2006).

claimant with a sprain to the neck and back that seemed to have resolved. Dr. Barrett released claimant to return to work with no specific restrictions but did discuss with her proper lifting techniques for patient care.

Claimant was again seen by Dr. Barrett in December 2005. At that time, claimant complained that her pain had gotten worse. The physical examination, however, showed no difference from the previous examination. Although claimant had subjective complaints, there were no objective findings to substantiate them. All x-rays of the hip, lumbar spine, thoracic spine and cervical spine, as well as an MRI of the thoracic spine, were negative. Dr. Barrett diagnosed her with chronic neck and back pain with no objective findings. She did not impose any permanent physical restrictions on claimant. Dr. Barrett noted that claimant's lifting would be limited by her physical stature, not necessarily from any injury to the back. Dr. Barrett explained that claimant weighed 105 pounds, and because she had such a small stature, there would be a limit on how much she could physically do. The limitations were based on claimant's physical body rather than any findings on the examination.

Dr. Barrett did not know whether claimant was in good athletic condition before her accident, stating that she did not put claimant through a functional evaluation to determine her fitness or athletic condition. She did not know claimant's capacity to lift before her injury. Because of claimant's small stature, Dr. Barrett would be concerned about her lifting over a certain weight. She could not, however, give a specific weight that claimant could safely lift without a functional capacity evaluation, which was not performed.

Dr. Barrett found that claimant had a 0 percent permanent partial impairment for her neck and upper back, but rated her as having a 5 percent permanent partial impairment of the low back under the AMA *Guides*.[3]

Dr. Bernard Poole, an orthopedic surgeon, saw claimant on July 18, 2005, at the request of respondent. He saw her again two days later to allow him to evaluate and interpret an MRI claimant forgot to bring with her to her first visit. Dr. Poole testified:

> I find no evidence that this patient has identifiable traumatic or injury pathology, but I also find that this is a painfully thin, under-muscled lady who weighs barely 100 pounds and is 5 feet, 6 inches tall and has absolutely no muscular strength whatever. I think that for this lady attempting to do any heavy manual laboring work will always be a disaster.[4]

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[4] Poole Depo. at 7.

Dr. Poole described claimant as "a frail lady."[5] He did not discuss with her any of her physical athletic activities or work activities before the work-related accident. He testified that claimant should not lift more than 25 to 30 pounds on a repetitive basis. On a single lift basis, he would not recommend she lift more than 75 pounds.

Dr. Peter Bieri, who is board certified in disability evaluation, examined claimant on September 28, 2005, at the request of her attorney. Claimant gave a history of injury on November 20, 2004, while helping transfer a patient from a whirlpool bath. Claimant's condition worsened after an additional injury on January 11, 2005. Claimant complained of persistent pain in her neck and low back radiating into her right hip. She continues to remain symptomatic.

Dr. Bieri's examination of claimant's cervical spine did not reveal palpable muscle spasms while claimant was at rest. There was some slight tenderness to diffuse palpation. Active range of motion was decreased to flexion and extension and was accompanied by subjective complaints of pain and brief palpable muscle spasm and guarding.

In examining claimant's lumbar spine, Dr. Bieri again found no visible or palpable muscle spasm at rest. Claimant, however, expressed tenderness to palpation at L5-S1 that radiated into the right hip. Dr. Bieri found range of motion decreased to flexion and extension as well as lateral flexion, accompanied by a subjective increase in complaints of pain and discomfort. Again he found brief muscle spasm and guarding. He found no atrophy, and strength and sensation were normal. Claimant could walk on her heels and toes without difficulty. Straight leg raising test was positive on the right at 70 degrees because claimant expressed that she had pain radiating into the right knee. Straight leg raising on the left was positive at 90 degrees for localized back pain only.

Based on the AMA *Guides*, Dr. Bieri rated claimant as having a 5 percent permanent partial impairment for DRE cervicothoracic category II and a 5 percent permanent partial impairment for DRE lumbosacral category II, which combined for a 10 percent whole person impairment.

Dr. Bieri judged claimant to be in the light-medium demand level, which limits occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting. Stooping and bending at the level of the waist should be performed no more than frequently, with kneeling, crouching and crawling performed no more than occasionally to frequently. He stated these restrictions were directly related to her impairment, and the impairment was a direct result of her injuries.

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[5] *Id.* at 12.

Regarding claimant's small stature, Dr. Bieri testified he was not aware of any authoritative literature that indicates that individuals of light stature should have restrictions and limitations placed upon them due to their light stature only.

Dr. Bieri reviewed the task loss list prepared by Dr. Rosell and noted 16 tasks that claimant was unable to perform, out of a total of 31. However, Dr. Bieri did not separate out the duplicated tasks. Comparing the tasks Dr. Bieri indicates claimant can no longer perform with the list of unduplicated tasks in Dr. Rosell's report, Dr. Bieri found claimant cannot perform 13 of the 27 unduplicated tasks, for a 48 percent task loss.

Jon Rosell, Ph.D., is a disability consultant/vocational expert. He met with claimant at the request of her attorney on October 27, 2005. They discussed the tasks she performed over her 15-year work history before her injury. He then prepared a task list which included 27 unduplicated tasks.

Dr. Rosell opined, considering claimant's age, education, work experience, and permanent physical restrictions, that claimant would be able to earn a salary within the range of $6.75 to $7.50 per hour. He believed that she could find a position as a sales representative or a cashier. He was not asked and did not testify about claimant's job search.

Neither Dr. Barrett nor Dr. Poole gave claimant work restrictions based upon any permanent injury or resulting impairment. Instead, they both recommended restrictions based upon claimant's small size and perceived frailty. However, claimant's history of vigorous sports, hobbies, and work activities demonstrates that Drs. Barrett and Poole underestimated her preinjury physical strength and abilities. Their restrictions, being based on claimant's physical stature alone, are unreliable and not relevant to the issue of work disability. In this instance, the Board finds the opinions of Dr. Bieri to be the most credible. Accordingly, the Board adopts his functional impairment rating of 10 percent and his task loss opinion of 48 percent.

Claimant's permanent disability benefits are to be determined under K.S.A. 44-510e, which provides in pertinent part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of

> permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job that the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the worker's ability to earn rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[8]

Respondent contends claimant's permanent disability benefits should be limited to her functional impairment rating because claimant was capable of performing her employment and, therefore, she failed to make a good faith effort to keep her job. Respondent further contends it acted in good faith in terminating claimant. However, the evidence shows respondent could not have or would not have accommodated claimant's injuries had she not been terminated.

Claimant has the burden of proof. The Board finds claimant was unable to perform her job with respondent within her restrictions. In short, claimant's ability to work has been severely affected by her injuries. She is now competing for employment in the open labor market saddled with restrictions and limitations. The basic premise of the Workers Compensation Act is to place the burden of industrial injuries on industry. There is no provision in the Act to restrict an injured worker's disability benefits to the functional impairment rating upon proof that an employer has acted in good faith. Conversely, in the

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Id.* at 320.

appellate court cases that limit a worker's benefits to the functional impairment rating the common thread appears to be the worker's lack of good faith effort to obtain or retain employment or the worker committed some wrongful act. Claimant is unable to continue working for respondent for reasons other than lack of a good faith effort. Therefore, she is entitled to receive a work disability, assuming she has sustained at least a 10 percent wage loss.[9]

The Board is persuaded that claimant has made a good faith effort to find other employment. Accordingly, the Board will not impute a post-injury wage based upon her ability. Instead, the work disability will be computed using her actual post-injury earnings. During the period that claimant was looking for work but was unemployed, her wage loss was 100 percent. Thereafter, she began working at Conoco on February 20, 2006. Comparing the $245 per week claimant makes working at the Conoco station to claimant's pre-injury wage of $387.20 per week yields a 36.73 percent wage loss.

As required by the permanent disability formula, the Board averages the 48 percent task loss with the 100 percent wage loss and finds claimant has sustained a 74 percent permanent partial general disability for the period ending February 19, 2006. Thereafter, her wage loss is 36.73 percent which, when averaged with the 48 percent task loss, results in a work disability of 42.37 percent.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Marvin Appling dated August 31, 2006, is modified to find that claimant is awarded a 10 percent functional permanent partial impairment from the date of accident of November 20, 2004, through January 11, 2005, her last day worked for respondent, followed by a period of 27.95 weeks where claimant was temporarily totally disabled, after which she is entitled to a work disability of 74 percent through February 19, 2006. Thereafter, claimant is entitled to a work disability of 42.37 percent.

The claimant is entitled to 7.43 weeks of permanent partial disability compensation at the rate of $258.15 per week or $1,918.05 for a 10 percent functional disability, followed by 27.95 weeks of temporary total disability compensation at the rate of $258.15 per week or $7,215.29, followed by 57.71 weeks of permanent partial disability compensation at the rate of $258.15 per week or $14,897.84 for a 74 percent work disability, followed by 105.21 weeks of permanent partial disability compensation at the rate of $258.15 per week or $27,159.96 for a 42.37 percent work disability, making a total award of $51,191.14.

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[9] See *Gadberry v. R.L. Polk & Co.*, 25 Kan App. 2d 800, 975 P.2d 807 (1998); *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

As of November 27, 2006, there would be due and owing to the claimant 27.95 weeks of temporary total disability compensation at the rate of $258.15 per week in the sum of $7,215.29 plus 69.91 weeks of permanent partial disability compensation at the rate of $258.15 per week in the sum of $18,047.27 for a total due and owing of $25,262.56, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $25,928.58 shall be paid at the rate of $258.15 per week for 100.44 weeks or until further order of the Director.

**IT IS SO ORDERED.**

Dated this _____ day of November, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge